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TO: Krista Y. Lee

FROM: Greg Petesch *GP*

RE: Easement update

At the Missoula meeting of the eminent domain subcommittee, I stated that the Montana Supreme Court has held that the use of a prescriptive easement is governed by the character and use during the period requisite to acquire the easement. Ferguson v. Standley, 89 Mont. 489, 300 P. 245 (1931). I also stated that Montana has not adopted sections 478 and 479 of the Restatement of Property allowing greater use of a prescriptive easement over time. Warnack v. Coneen Family Trust, 266 Mont. 203, 879 P.2d 715 (1994). However, in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 57 St. Rep. 125 (2000), the Montana Supreme Court held that in determining the intent of the parties regarding the extent of an easement by implication, consideration must be given not only to the actual uses made at the time of the severance, but also to uses that the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance. This holding modified a prior holding in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135 (1998). The uses of an easement by implication are therefore measured by the future uses that the parties might reasonably have expected from future uses of the dominant tenement. The Court followed section 484 of the Restatement of Property.

A way of necessity is a form of easement by implication. While the holding in Tungsten does not directly impact prescriptive easements, it may indicate the Court's willingness to reconsider the future uses of prescriptive easements.

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